

STATE OF MICHIGAN
COURT OF APPEALS

VASYL FEDOROVYCH HONCHARENKO and
IRINA HONCHARENKO,

UNPUBLISHED
April 20, 2006

Plaintiffs-Appellants,

v

JERRY VZODIMMA AGUWA,

No. 259816
Oakland Circuit Court
LC No. 04-059034-NI

Defendant-Appellee.

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition and dismissing the case. We vacate the trial court's order and remand for further proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On July 9, 2001, vehicles driven by Vasyl Honcharenko and defendant collided, and Vasyl Honcharenko sustained injuries. On June 14, 2004, plaintiffs filed suit seeking damages. The summons issued on June 14, 2004, carried an expiration date of September 13, 2004.

A process server attempted without success to serve defendant. On September 10, 2004, plaintiffs moved for entry of an order extending the summons for 30 days, and authorizing service of process by substitute means. On September 10, 2004, the trial court signed an order authorizing service of the summons and complaint by alternative means.¹ The order did not state that a second summons would issue. Defendant was served on September 22, 2004.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that he was entitled to dismissal of plaintiffs' complaint because plaintiffs failed to serve him with

¹ The trial court's docket entries indicate that plaintiffs' motion was filed on September 14, 2004, and that the order was filed on that date as well. However, the order is considered entered by the court when the judge signs the order. MCR 2.102(C) and (D); *Moriarity v Shields*, 260 Mich App 566, 572-573; 678 NW2d 642 (2004).

process within the applicable three-year limitations period, relying upon MCL 600.5805(10) and *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003). Plaintiffs responded that the trial court's order of September 10, 2004, extended the summons for 30 days; defendant was served within that period, and thus was not entitled to summary disposition. The trial court, apparently relying upon *Gladych*, granted defendant's motion and dismissed the case, concluding that because service was not attempted or accomplished on defendant until after the expiration of the three-year statute of limitations, plaintiffs' claim was time-barred:

The record reflects that the accident occurred on July 9, 2001; the complaint was filed on June 14, 2004. Plaintiffs' claim that the summons and complaint were placed in the hands of Police Officer David Strominger on July 1, 2004. Mr. Strominger's affidavit reflects that he first attempted service on defendant on July 26, 2004. Service of process was not effectuated on defendant until September, 2004, well beyond the three-year period of limitations set forth in MCL 600.5805. Therefore, plaintiffs' claim is time barred [emphasis original].

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Whether an action is barred by the statute of limitations is a question of law that we review de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

Prior to April 22, 2004, MCL 500.5856 provided that the running of a limitations period was tolled if, inter alia, the complaint was filed and a copy of the summons and complaint were served on the defendant, jurisdiction was otherwise obtained over the defendant, or the complaint was filed and a copy of the summons and complaint in good faith were placed with an officer for immediate service. In *Gladych*, our Supreme Court held that the mere filing of a complaint was insufficient to toll the statute of limitations, and that in order to toll the limitations period, a party must comply with the requirements of MCL 600.5856. *Gladych, supra* at 595.

2004 PA 87, effective April 22, 2004, amended MCL 600.5856 to provide that the statute of limitations is tolled, "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant *within the time set forth in the supreme court rules*," or when jurisdiction is otherwise acquired over the defendant (emphasis added). The amended version of MCL 600.5856 applies to actions filed on or after April 22, 2004, and therefore applied to this case.

The trial court's decision emphasized that defendant was not served within the three-year statute of limitations. MCL 600.5805. However, the proper focus under MCL 600.5856 is whether defendant was timely served under the "supreme court rules," which are the court rules. "A summons expires 91 days after the date the complaint is filed." MCR 2.102(D). However, within that period, on a showing of due diligence by the plaintiff in attempting to achieve service of process, the trial court may order a second summons to issue for a definite period. *Id.* If the summons expires before the defendant has been served, "the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction." MCR 2.102(E)(1).

We vacate the trial court's order granting defendant's motion for summary disposition and dismissing the case. The fact that defendant was not served until September 2004, beyond

three years after the injury, does not answer the question whether the statute of limitations was tolled once the complaint was filed. Instead, the proper inquiry under MCL 600.5856 is whether the defendant was timely served under the court rules set forth above. This the trial court did not answer.

It is undisputed that plaintiffs filed suit on June 14, 2004, and the initial summons issued expired on September 13, 2004. The record does not explicitly support plaintiffs' assertion that the trial court ordered the issuance of a second summons as the order makes no reference to the issuance of a second summons. However, plaintiffs' motion requested an additional 30 days to serve defendant by substituted service, and the trial court ordered substituted service that had to take place over at least the following three weeks. Thus, it appears that the trial court intended to give plaintiff an additional 30 days to serve defendant, but because it did not order a second summons to issue, the record is equivocal on this point.

We therefore vacate the trial court's order, and remand for the trial court to determine whether it intended to grant plaintiffs a second summons for 30 days. If it did, plaintiffs timely served defendant and the statute of limitations would have been tolled upon filing. MCL 600.5856(a). If it did not, then plaintiffs failed to timely serve defendant and the complaint would be subject to dismissal. *Id.*

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray